

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOSEPH PEREZ,

Plaintiff

Case No. 2:21-cv-2059-GMN-EJY

SCREENING ORDER

v.

CHARLIES DANIELS, et al.,

Defendants

Plaintiff Joseph Perez, who is incarcerated in the custody of the Nevada Department of Corrections (“NDOC”), has submitted a civil-rights complaint under 42 U.S.C. § 1983 and has filed an application to proceed *in forma pauperis*. (ECF Nos. 1, 1-1). The matter of the filing fee will be temporarily deferred. Perez also moves the Court to appoint him a free attorney (ECF No. 1-2) and for summonses to be served by the U.S. Marshal. (ECF No. 3). The Court now screens Perez’s civil-rights complaint pursuant to 28 U.S.C. § 1915A, defers ruling on his motion for appointment of counsel, and denies his motion to serve summonses.

I. SCREENING STANDARD

Federal courts must conduct a preliminary screening in any case in which an incarcerated person seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the Court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. See *id.* §§ 1915A(b)(1), (2). *Pro se* pleadings, however, must be liberally construed. See *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) the violation of a right secured by the Constitution or laws of the United States; and (2) that the alleged violation was committed by a person acting under color of state law. See *West v. Atkins*, 487 U.S. 42, 48 (1988).

1 In addition to the screening requirements under § 1915A, under the Prison
2 Litigation Reform Act (“PLRA”), a federal court must dismiss an incarcerated person’s
3 claim if “the allegation of poverty is untrue” or if the action “is frivolous or malicious, fails
4 to state a claim on which relief may be granted, or seeks monetary relief against a
5 defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2). Dismissal of a
6 complaint for failure to state a claim upon which relief can be granted is provided for in
7 Federal Rule of Civil Procedure 12(b)(6), and the Court applies the same standard under
8 § 1915 when reviewing the adequacy of a complaint or an amended complaint. When a
9 court dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend
10 the complaint with directions as to curing its deficiencies, unless it is clear from the face
11 of the complaint that the deficiencies could not be cured by amendment. See *Cato v.*
12 *United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

13 Review under Rule 12(b)(6) is essentially a ruling on a question of law. See
14 *Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to
15 state a claim is proper only if the plaintiff clearly cannot prove any set of facts in support
16 of the claim that would entitle him or her to relief. See *Morley v. Walker*, 175 F.3d 756,
17 759 (9th Cir. 1999). In making this determination, the Court takes as true all allegations
18 of material fact stated in the complaint, and the Court construes them in the light most
19 favorable to the plaintiff. See *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996).
20 Allegations of a *pro se* complainant are held to less stringent standards than formal
21 pleadings drafted by lawyers. See *Hughes v. Rowe*, 449 U.S. 5, 9 (1980). While the
22 standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff must
23 provide more than mere labels and conclusions. See *Bell Atl. Corp. v. Twombly*, 550 U.S.
24 544, 555 (2007). A formulaic recitation of the elements of a cause of action is insufficient.
25 See *id.*

26 Additionally, a reviewing court should “begin by identifying pleadings [allegations]
27 that, because they are no more than mere conclusions, are not entitled to the assumption
28 of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “While legal conclusions can provide

the framework of a complaint, they must be supported with factual allegations.” *Id.* “When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Id.* “Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* Finally, all or part of a complaint filed by an incarcerated person may be dismissed *sua sponte* if that person’s claims lack an arguable basis either in law or in fact. This includes claims based on legal conclusions that are untenable (e.g., claims against defendants who are immune from suit or claims of infringement of a legal interest which clearly does not exist), as well as claims based on fanciful factual allegations (e.g., fantastic or delusional scenarios). See *Neitzke v. Williams*, 490 U.S. 319, 327–28 (1989); see also *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

II. SCREENING OF COMPLAINT

In his Complaint, Perez sues ten Defendants for events that took place while he was incarcerated at High Desert State Prison (“HDSP”). (ECF No. 1-1 at 1–5).¹ Perez sues NDOC Director Charles Daniels; Warden Calvin Johnson; NDOC Medical Director Michael Minev; Director of Nursing Bob Faulkner; Director of Nursing Services Sonya Carillo; and Nurses Jamie Cabrera, Malo, B. Gutierrez, Arhynard, and A. Buen. (*Id.* at 5). Perez alleges two claims and seeks declaratory, injunctive, and monetary relief. (*Id.* at 7–12).

Perez alleges the following. He has a high-blood-pressure condition, a severe spinal injury, and pain in and damage to his left arm. (*Id.* at 6). Doctors have prescribed Perez medications for his conditions, including Lisinopril, Baclofen, Meloxicam, and fish oil pills. (*Id.*) From 2018 to 2021, prison staff have denied Perez’s requests for his medication. (*Id.*) Minev, Faulkner, and Carillo “had knowledge of the negligent acts of pill call nursing staff and didn’t take action to resolve their pattern of misconduct against

¹ Prisoner John Snow (#19598) prepared or helped prepare Perez’s Complaint. ECF No. 1-1 at 12.

1 plaintiff.” (*Id.* at 7.) Those Defendants are “responsible for the overall administrative
2 supervision of all medical division employees at their institution.” (*Id.*)

3 Defendants Jamie, Malo, Gutierrez, Buen, and Arhynard denied Perez’s requests
4 for medication. (*Id.*) “Pill call staff wear I.D. badges backwards not displaying their
5 complete names.” (*Id.*) Perez has hundreds of documents to support his allegations. (*Id.*)
6 Defendants also delayed Perez’s rehabilitation and did not provide him medication after
7 that therapy to assist his recovery, which caused him pain and worsened his high-blood-
8 pressure condition. (*Id.* at 8.)

9 Based on these allegations, Perez contends that Defendants were deliberately
10 indifference to his serious medical needs or were negligent. The Court liberally construes
11 the Complaint as bringing claims based on three different theories of liability:
12 (1) deliberate medical indifference by not supplying prescribed high-blood-pressure and
13 pain-relieving medication, (2) deliberate-medical indifference by delaying rehabilitation for
14 injuries, and (3) state law negligence. The Court addresses each theory and any related
15 issues in turn.

16 **A. Eighth Amendment—deliberate medical indifference claims**

17 The Eighth Amendment prohibits the imposition of cruel and unusual punishment
18 and “embodies broad and idealistic concepts of dignity, civilized standards, humanity, and
19 decency.” *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quotation omitted). A prison official
20 violates the Eighth Amendment when he acts with “deliberate indifference” to the serious
21 medical needs of an inmate. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). “To establish
22 an Eighth Amendment violation, a plaintiff must satisfy both an objective standard—that
23 the deprivation was serious enough to constitute cruel and unusual punishment—and a
24 subjective standard—deliberate indifference.” *Snow v. McDaniel*, 681 F.3d 978, 985 (9th
25 Cir. 2012), *overruled on other grounds by Peralta v. Dillard*, 744 F.3d 176, 1082–83 (9th
26 Cir. 2014).

27 To establish the first prong, “the plaintiff must show a serious medical need by
28 demonstrating that failure to treat a prisoner’s condition could result in further significant

1 injury or the unnecessary and wanton infliction of pain.” *Jett v. Penner*, 439 F.3d 1091,
2 1096 (9th Cir. 2006) (quotations omitted). To satisfy the deliberate indifference prong, a
3 plaintiff must show “(a) a purposeful act or failure to respond to a prisoner’s pain or
4 possible medical need and (b) harm caused by the indifference.” *Id.* “Indifference may
5 appear when prison officials deny, delay or intentionally interfere with medical treatment,
6 or it may be shown by the way in which prison physicians provide medical care.” *Id.*
7 (quotations omitted).

8 Based on the allegations, for four years nurses Jamie, Malo, Gutierrez, Buen, and
9 Arhynard denied his requests for medication. Perez was prescribed the medications by a
10 doctor to treat his high-blood-pressure condition and pain he suffers from an injury. Minev,
11 Faulkner, and Carillo knew that the nurses did not provide Perez with his prescribed
12 medications because they are their supervisors. And prison staff delayed supplying Perez
13 rehabilitation after he was injured. The Court finds that these allegations are not sufficient
14 to state a colorable claim of deliberate indifference to serious medical needs against any
15 Defendant.

16 Perez adequately alleges that he had a serious medical need for blood-pressure
17 medication and pain-relieving medication. But Perez does not plead facts to support his
18 conclusion that nurses Jamie, Malo, Gutierrez, Buen, and Arhynard denied his requests
19 for medication. Although Perez does not need to have detailed allegations, he must plead
20 some facts to state a colorable claim. For example, Perez does not plead facts describing
21 the circumstances of at least one instance where each nurse denied his request for
22 medication. Perez does not even plead information in a summary fashion, like that he
23 filed many grievances asking for his prescribed medications over the years and each
24 nurse denied at least one grievance without scheduling him to see a provider or supplying
25 him the prescribed medication. So Perez has not shown with facts that either Jamie, Malo,
26 Gutierrez, Buen, or Arhynard was deliberately indifferent to his need for medication.

27 Perez also does not plead facts about when he was injured, how he was injured,
28 when he asked for or was told he needed rehabilitation treatment, information about those

1 events, or when he received rehabilitation therapy. Nor does he plead facts about who
2 delayed his rehabilitation therapy. What this means is that Perez has not established
3 either prong of the Eighth Amendment analysis for his theory that prison officials were
4 deliberately indifferent when they delayed his rehabilitation therapy.

5 As for Perez's allegations about Minev, Faulkner, and Carillo, he does not plead
6 any facts to causally connect any of those Defendants to the denial of his prescribed
7 medications or delay of his rehabilitation therapy. Perez's allegation that those
8 Defendants acted in a supervisory capacity is not enough to state a claim for supervisory
9 liability under § 1983. A defendant is liable under § 1983 "only upon a showing of personal
10 participation by the defendant." *Perez v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). "A
11 supervisor is only liable for constitutional violations of his subordinates if the supervisor
12 participated in or directed the violations, or knew of the violations and failed to act to
13 prevent them. There is no respondeat superior liability under [§] 1983." *Id.*; see also *Iqbal*,
14 556 U.S. at 676 (holding that "[b]ecause vicarious liability is inapplicable to *Bivens* and §
15 1983 suits, a plaintiff must plead that each Government-official defendant, through the
16 official's own individual actions, has violated the Constitution").

17 "A showing that a supervisor acted, or failed to act, in a manner that was
18 deliberately indifferent to an inmate's Eighth Amendment rights is sufficient to
19 demonstrate the involvement—and the liability—of that supervisor." *Starr v. Baca*, 652
20 F.3d 1202, 1206–07 (9th Cir. 2011). "Thus, when a supervisor is found liable based on
21 deliberate indifference, the supervisor is being held liable for his or her own culpable
22 action or inaction, not held vicariously liable for the culpable action or inaction of his or
23 her subordinates." *Id.* at 1207. As such, "a plaintiff may state a claim against a supervisor
24 for deliberate indifference based upon the supervisor's knowledge of and acquiescence
25 in unconstitutional conduct by his or her subordinates." *Id.*

26 The Court thus finds that Perez's allegations do not state a colorable claim for
27 deliberate medical indifference against any Defendant or under any theory. But it does
28 not yet appear that Perez cannot state any set of facts upon which relief could be granted.

1 So the Eighth Amendment deliberate-indifference-to-serious-medical-needs claims are
2 dismissed without prejudice and with leave to amend.

3 **B. State law negligence**

4 Perez appears also alleges a claim for negligence. (See ECF No. 1-1 at 7). Under
5 Nevada law, the State of Nevada has generally waived sovereign immunity for state tort
6 actions in state court. Nev. Rev. Stat. § 41.031(1). To sue the State of Nevada or a state
7 employee, the plaintiff must sue the State of Nevada or appropriate political subdivision.
8 Nev. Rev. Stat. §§ 41.031, 41.0337. “In any action against the State of Nevada, the action
9 must be brought in the name of the State of Nevada on relation of the particular
10 department, commission, board or other agency of the State whose actions are the basis
11 for the suit.” *Id.* § 41.031(2).

12 In *Craig v. Donnelly*, 439 P.3d 413 (Nev. App. 2019), the Nevada Court of Appeals
13 held that “while a plaintiff must name the State as a party to any state tort claims in order
14 to comply with NRS 41.031 and NRS 41.0337, this statutory requirement does not apply
15 to 42 U.S.C. § 1983 claims, even when brought in the same complaint as a plaintiff’s state
16 tort claims. Indeed, the State cannot be named as a party to a plaintiff’s § 1983 civil rights
17 claims.” *Id.* at 414. In *Craig*, the Nevada Court of Appeals addressed whether a plaintiff
18 had to name the State as a party in a state court case. *Id.* at 413.

19 With respect to federal court cases, the State of Nevada does not waive its
20 immunity from suit conferred by the Eleventh Amendment. Nev. Rev. Stat. § 41.031(3).
21 Generally, the State of Nevada and arms of the state cannot be sued in federal court. See
22 *O’Connor v. State of Nev.*, 686 F.2d 749, 750 (9th Cir. 1982) (holding that “Nevada has
23 explicitly refused to waive its immunity to suit under the eleventh amendment . . . The
24 Supreme Court has made it clear that section 1983 does not constitute an abrogation of
25 the eleventh amendment immunity of the states”). In *Stanley v. Trustees of California*
26 *State Univ.*, 433 F.3d 1129, (9th Cir. 2006), the Ninth Circuit held that 28 U.S.C. § 1367
27 does not abrogate state sovereign immunity for supplemental state law claims. *Id.* at
28 1133–34. Although the State of Nevada may consent to federal court jurisdiction for state

1 law claims through removal, this is not a removed case. *See Lapidés v. Bd. of Univ. Sys.*
 2 *Of Ga.*, 535 U.S. 613 (2002) (holding that state's removal of suit to federal court
 3 constitutes waiver of its sovereign immunity).

4 For this reason, the Court finds that Perez must raise his state law negligence
 5 claim in state court and dismisses that claim accordingly. *See Hirst v. Gertzen*, 676 F.2d
 6 1252, 1264 (9th Cir. 1982) (holding that, where Montana law deemed governmental
 7 entities indispensable parties in a state tort claim against a county employee, the federal
 8 court had no supplemental jurisdiction over the state tort claim if it had no jurisdiction over
 9 the indispensable party).

10 **III. LEAVE TO AMEND**

11 The Court does not grant Perez leave to amend in any way that he sees fit. Perez
 12 has leave to amend by alleging additional true facts to show that that (1) any Defendant
 13 was aware of Perez's need for rehabilitation therapy for his injury or medication to treat
 14 his high-blood-pressure condition or pain from his injury and (2) acted or failed to act in
 15 response to that need. The Court does not give Perez leave to assert new claims.

16 If Perez chooses to file an amended complaint, he is advised that an amended
 17 complaint replaces the prior complaint, so the amended complaint must be complete in
 18 and of itself. This means that the amended complaint must contain all facts and claims
 19 and identify all defendants that Perez intends to sue. He must file an amended complaint
 20 on the Court's approved prisoner-civil-rights form, and it must be entitled "First Amended
 21 Complaint." Perez must follow the instructions on the form. He need not and should not
 22 allege very many facts in the "nature of the case" section of the form. Rather, in each
 23 count, Perez should allege facts sufficient to show what each Defendant did to violate his
 24 civil rights. Perez must file an amended complaint **by March 28, 2022**.

25 **IV. MOTION TO SERVE SUMMONSES**

26 Perez moves the court to direct the U.S. Marshal to serve summonses on the
 27 Defendants in this case. (ECF No. 3). The Court has now dismissed Perez's claims either
 28 with prejudice or with leave to amend, so the time to serve any defendant with a summons

1 and copy of the complaint has not yet come. If necessary, the Court will enter an order
 2 later describing how service of process should be conducted in this case. The Court
 3 therefore denies Perez's motion to serve defendants with process.

4 **V. CONCLUSION**

5 It is therefore ordered that a decision on the application to proceed *in forma*
 6 *pauperis* (ECF No. 1-1) is **deferred**.

7 It is further ordered that a decision on the motion to appoint counsel (ECF No. 1-
 8 2) is **deferred**.

9 It is further ordered that the motion to serve summonses (ECF No. 3) is **denied**.

10 It is further ordered that:

- 11 • The claim for Eighth Amendment deliberate indifference to serious medical
 12 needs (not supplying prescribed high-blood-pressure and pain-relieving
 13 medication) is **dismissed without prejudice and with leave to amend**;
- 14 • The claim for Eighth Amendment deliberate indifference to serious medical
 15 needs (delaying rehabilitation for injuries) is **dismissed without prejudice**
 16 **and with leave to amend**; and
- 17 • The claim for state law negligence is **dismissed without prejudice but**
 18 **without leave to amend** as amendment in federal court would be futile.

19 It is further ordered that Defendants Charles Daniels, Calvin Johnson, Michael
 20 Minev, Bob Faulkner, Sonya Carillo, Jamie Cabrera, Malo, B. Gutierrez, Arhynard, and A.
 21 Buen are **dismissed without prejudice** from the Complaint.

22 It is further ordered that if Perez chooses to file an amended complaint curing the
 23 deficiencies of his Complaint as outlined in this order, he must use the approved form for
 24 filing a § 1983 complaint, write the words "First Amended" above the words "Civil Rights
 25 Complaint" in the caption, and file the amended complaint **by March 28, 2022**.

26 It is further ordered that if Perez chooses not to file an amended complaint curing
 27 the stated deficiencies of the Complaint, this action will be dismissed without prejudice
 28 for failure to state a claim.

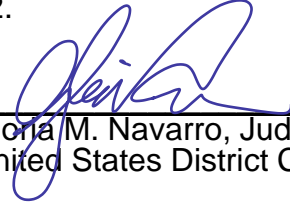
1 Finally, the Clerk of the Court is directed to:

- 2 • **File** the Complaint (ECF No. 1-1); and
- 3 • **Send** Perez a copy of the Complaint (ECF No. 1-1), the approved form for
- 4 filing a § 1983 complaint, and instructions for the same.

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6 DATED THIS 28 day of February, 2022.

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Gloria M. Navarro, Judge
United States District Court

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